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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. 27

BRUCE'S JUICES, INC., a Corporation, *Petitioner*,

v.

AMERICAN CAN COMPANY, a Corporation.

On Writ of Certiorari to the Supreme Court of the State of Florida.

## BRIEF FOR BRUCE'S JUICES, INC., PETITIONER.

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**On Writ of Certiorari to the Supreme Court of the State of Florida.**

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## BRIEF FOR BRUCE'S JUICES, INC., PETITIONER.

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*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.*

### OPINIONS BELOW.

The opinion of the Florida Supreme Court, following the first hearing, is reported in 22 So. 2d 461, and appears in R. 593. The judgment, after reargument, is reported in 22 So. 2nd 461, 465, and appears in R. 621. The order denying a second re-hearing is reported in R. 622.

## JURISDICTION.

The final judgment of the Florida Supreme Court, R. 621, was delivered April 17, 1945. An order staying the mandate pending proceedings in this Court was entered June 30, 1945. (R. 622).

The jurisdiction of this Court is invoked under Section 344(b), Title 28, U. S. C. A., (Jud. Code, Sec. 237), the petitioner having been denied a right, privilege, or immunity specifically set up and claimed under a federal statute, to wit: Sections 13 and 13a of the Robinson-Patman Act, Title 15, U. S. C. A.

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

Bruce's Juices, Inc., is an independent processor of fruit juices operating a plant in Tampa, Florida. It sells its products in a number of states which can be economically supplied from that base. Over a period of years it bought containers for its use from American Can Company. Its annual purchases from that company amounted to about $350,000.00. (R. 110).

The American Can Company is the world's largest manufacturer of cans. Under a central management it operates plants and warehouses in twenty-five states (including a plant at Tampa) in order most effectively to meet competition in each area. (R. 320). Its costs in these several plants, dependent as they must be upon varying circumstances of production, are different. American Can Company supplies the containers used by the larger competitors of your petitioner which sell not only in petitioner's market, but on a nation wide scale. Among them are California Packing Corporation (Del Monte brand); Stokely Brothers and Company (The Van Camp brand); Hawaiian Pineapple Company; Libby, McNeil & Libby; and the Great Atlantic and Pacific Tea Company. (R. 111-112). These large competitors, purchasing from the same com-

pany as your petitioner, are supplied, not from a single plant, but from plants located all over the country. Their aggregate annual purchases, scattered among many plants, amount to many millions of dollars each. California Packing Corporation alone buys more than $7,000,000.00 in cans each year from American Can Company. (R. 200-201).

The contracts under which American Can Company supplies cans both to your petitioner and to its larger competitors are practically identical. (R. 106-108). The quoted prices are subject to a sliding scale of discounts based upon total annual purchases, irrespective of whether the orders are filled from one or many plants. These discounts run from 5% if the annual purchase is over $7,000,000.00 down to 1% on a $500,000.00 annual purchase. No discounts are allowed for quantities under $500,000.00. (R. 129). The practice of basing discounts upon such aggregate purchases instead of upon orders filled from a single plant does not reflect differences in costs. The respondent claims no difference in manufacturing expense between large and small orders. (R. 102). It claims justification in higher sales cost to the small purchaser; but admits that such "estimates" rest upon no adequate empirical data. (R. 572-574). The avowed classification of customers is allowed to stand without the kind of legal justification demanded by the Robinson-Patman Act.

The effect of the system is seriously to handicap the independent company selling in competition with a corporation which operates a number of widely scattered plants. The situation presented by this case is an excellent example of how such a system discriminates. In Tampa, Florida, is located the canneries of Bruce's Juices, Inc., and of other independents. There, too, are located plants of the California Packing Corporation and of Stokely Brothers and Company. The contracts under which all these concerns are supplied are identical. Petitioner buys from the American Can Company's plant in Tampa a quantity approximately equal to the amounts sold to each of

these larger competitors. Yet petitioner receives no discount while the California Packing Corporation receives a discount of 5% upon orders of the same size. It is clear that, under such an arrangement, the product of an independent can not compete on equal terms, even within its own market, with the nation wide brand. When it is remembered that the canning business is one of great volume and small profit and that the cost of cans often runs to a very high percentage of the factory cost of the product,[1] it is clearly evident that survival becomes almost impossible for the small independent canner. It is a direct invitation, indeed a compulsion, toward the merger of independent local canners into one or more combinations or toward their absorption by corporations which sell on a nation wide scale. For example, if the California Packing Corporation should acquire Bruce's Juices, Inc., the petitioner, through the very fact of operating as a part of a larger corporate imperium, would immediately be entitled to the 5% discount which is now beyond its reach.

The case at bar arose out of the competitive hardship imposed by the system of discounts outlined above. Ever since the passage of the Robinson-Patman Act your petitioner has had a continuing account with American Can Company under which for the period from 1937 to 1942 only it has paid more than $2,000,000.00 for cans. (R. 110).

[1] For example, in a case involving this same respondent, *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763, at page 766, the Circuit Court of Appeals for the Seventh Circuit found the following with respect to the cost of cans:

> "The jury was justified in finding, or at least there was evidence sufficient to support such findings, that the discount amounted to 18 per cent. of the price paid by Van Camp; that Van Camp purchased during the period covered by the suit some $18,000,000 worth of cans; that the cost of the tin can is an important item in packing costs, amounting to nearly one-third of the entire cost and in some instances equals or exceeds the cost of the food material placed in the can; that 2½ cents per case was the usual profit to the packer on winter packed goods, and the price discount granted Van Camp was a material factor in the sale of the finished product."

Prior to the institution of this suit it owed a balance on this account of about $114,000.00 which was substantially represented by promissory notes. Your petitioner had repeatedly protested against the system of price discrimination and against other special favors to its larger competitors. (R. 83). As antecedent to a settlement of its account, it asked for an adjustment on the basis of the equality of treatment demanded by federal law; but no relief was given. Instead American Can Company brought the present suit on the promissory notes. It thus sought to enlist the aid of the Florida Courts in policing its system of discriminatory prices and competitive handicaps.

The sole defense to this action finally relied on by petitioner was that the renewal notes sued on were illegal and unenforceable, since the excess in price imposed upon your petitioner above that charged its larger competitors was in violation of the Robinson-Patman Act. It was, therefore, plead that such excess—represented substantially by the aggregate sum of the notes—was not lawfully due. In respect to the defense sought to be interposed, no issue of fact was ever tried.

Proceedings in the lower court were limited to a pre-trial conference instituted by the court on its own motion. (R. 37, 57). Its sole purpose, in accordance with the ruling Florida decision,[2] was to ascertain whether amendments should be made to the pleadings and to narrow and clarify the issues in controversy. (R. 37-39, 57-59). To this end testimony was heard and depositions were taken. It was not, and it was never intended to be, a trial of issues of fact. The record here, voluminous as it is, is to be considered in the light of the function it was intended to serve. The taking of testimony, both upon the discriminations of American Can Company, including its price policies, and upon its alleged justification, was never completed. In respect to these issues the plaintiff refused to answer ques-

[2] *Hillsborough County v. Sutton*, 150 Florida 601, 8 So. 2nd 401 (1942).

tions, and its refusals were never ruled on by the court. (R. 457-458, 460, 578-579). The trial judge gave no official consideration to this incomplete body of evidence; in respect to the issues touched off by your petitioner's plea of price-discrimination, he made no findings of fact.[3] Before the pre-trial conference was completed he came to the conclusion that, as a matter of law, the defense that the contract violated the Robinson-Patman Act was not available in a suit in a state court. He held, in the light of that ruling, that there was no purpose in completing the testimony, (R. 581), and entered judgment against petitioner in the sum of $122,798.60. (R. 584-585).

From this judgment your petitioner took an appeal to the Supreme Court of Florida. Its allegations of error, some eight in number, were concerned in one way or another with rulings—or failures to rule—in respect to the plea of a violation of the Robinson-Patman Act which the defendant sought to interpose. (R. 588-589). There were no findings of fact by the trial judge in respect to any of the disputed price-practices; and, in fact, within this realm of discrimination and justification, there were no findings in respect to which an appeal could have been taken. After argument, and in a carefully considered opinion, the Supreme Court of Florida, two of the seven judges dissenting, reversed the ruling of the trial court. It held that the defense of a violation of the Robinson-Patman Act was available to your petitioner; that at the end of a pre-trial conference a summary judgment was "proper" only where "material facts were not controverted"; and that there was "much in the record to indicate that issues of fact were not absent if testimony relative to the pleas were to

[3] We are resolving this question in favor of respondent. It could well be argued that the trial court held by its statement "The contract of sale was not under these decisions Malum in se but Malum prohibita only" that the admitted contracts under which American Can Company did business violated the provisions of the Robinson-Patman Act.

be considered."[4] It, therefore, remanded the case for trial of the issues raised by that defense. (R. 593-601. Also printed as Appendix A to this brief).

After a rehearing the Supreme Court of Florida, by a vote of four to three, affirmed the judgment of the court below, ignoring its former ruling. Three judges out of seven, in a so-called *per curiam* opinion, without citation of authority or recitation of reasons, held that "the defense attempted to be interposed was not available under the facts submitted in evidence to the court below and, therefore, the judgment should be affirmed." One judge insisted that he had "come to the conclusion that the subject matter of the pleas" was "not legally available as a defense in the state courts in a common law suit on the promissory notes involved." He, *therefore*, concurred "in the conclusion that the judgment of the Court below should be affirmed." (R. 621). The three remaining judges adopted as their dissenting opinion the original opinion rendered by the court. (R. 621. Also Appendix A to this brief). Thus four judges, differing in their interpretation of the law, voted to affirm the judgment of the court below. A rehearing asked by the defendant was denied, (R. 622), thus leaving to your petitioner no remedy save a petition to this Honorable Court.

[4] The ruling Florida case is *Hillsborough County* v. *Sutton*, 150 Florida 601, 8 So. 2d. 401. There the court said, "If the controversy progresses to the point of eliminating all questions of fact then the court may give judgment according to law on the facts before him." The court in the instant case commented, "It appears to have been the ruling that such method was proper where material facts were not controverted." (R. 600). The first opinion, in which this language occurs, was never withdrawn.

## QUESTIONS PRESENTED.

1. **In an Action in a State Court to Collect Promissory Notes Given as Consideration for Purchases in Interstate Commerce at Prices Which Through Their Discriminatory Character Tend Substantially to Lessen Competition, May the Defendant Plead That Such Notes Are Unenforceable Because the Transactions on Which They Are Based Violate the Robinson-Patman Act?**

This question does not require the Court to decide that the entire transaction is so tainted with illegality that the seller cannot collect even the fair value of the goods, thus giving the buyer a windfall. The question can, of course, be answered on the broad ground that a transaction unlawful under the Robinson-Patman Act constitutes criminal conduct upon which no money judgment can be based.

But, if it be admitted that the buyer is entitled to the fair value of the goods, petitioner's defense can be sustained on a narrower ground. It is that narrow ground which is actually presented by the record. There is here, on the part of the respondent, no mere demand for the fair value of its merchandise. Instead the record of the unfinished pretrial conference suggests the strong probability that petitioner has already paid the fair value based on prices at which American Can Company sells to its larger competitors. This is, in fact, not a suit for debt lawfully due. It is rather an action to enforce a system of prices and trade practices which, through its departures from equality of treatment, has prevented and still prevents petitioner from competing on equal terms with its more favored rivals. If, in separate actions brought against individual purchasers, state courts can enforce the collection of discriminatory prices, they can defeat the entire purpose of the Robinson-Patman Act. By denying such a defense as is sought here, they can make secure a widespread system of mercantile discrimination. Thus, by their very judgments, state courts can put a sanction on transactions forbidden by federal law.

By obtaining a judgment in this case American Can Company has secured the aid of a state court in effectuating the objective which the Act specifically condemns. Thus the state court has become an active instrument in injuring, lessening and preventing the market competition which it is the very intent of the antitrust acts to keep alive.

**2. Are the Pleas—As Clarified and Supported by the Unfinished Pre-Trial Conference—Sufficient to Require the Lower Court to Submit the Issues of Price Discrimination to Trial on Their Merits?**

The record represents the proceedings of an unfinished pre-trial conference. It is put forward to show that the plea of violation of the Robinson-Patman Act which petitioner sought to interpose in the action brought against it is substantial and not frivolous. It is introduced for the sole purpose of demonstrating that the defense sought raises a series of important federal questions upon which petitioner is entitled to a trial at law.

The larger question breaks into three separate questions:

(1) Were the allegations by petitioner of discriminatory practices in violation of the Robinson-Patman Act sufficient to require their submission to trial by law?

These allegations, supplemented by the pre-trial conference, disclosed the following illegal practices:

(a) Contracts between the American Can Company and the competing customers to whom it sells at prices highly discriminatory on their face in violation of the Robinson-Patman Act.

(b) Departures from the quoted prices, e.g., sale of cans in Texas at prices lower than those made to petitioner, in violation of that statute.

(c) Favors and special services, such as equipment for closing cans and "freight equalization", withheld from

petitioner without extra payment and rendered without cost to its larger competitors, in violation of that Act.

(2) Was the so-called system of "quantity discounts" to be justified by differences in costs,[5] or was it in effect a system for the classification of customers by size which it was the intent of the Robinson-Patman Act to forbid?

(3) Did petitioner, at the pre-trial conference, make such admissions as to forfeit its right to have the issues submitted to a trial at law; or, on the contrary, were such admissions made by the respondent as to invite a summary judgment on the plea of price-discrimination in favor of your petitioner?

### 3. Is a Right Established by Federal Law to be Abridged or Denied by Serious Departures From the Ordinary Requirements of Proper Process in a State Court?

Petitioner grants that, within the most tolerant limits, the highest court of a state is free to shape its own judicial procedure and to review the judgments of its lower courts in its own way. Nor does it question the right of the Florida Supreme Court, in a cause which involves only state law, to exercise a wide discretion in respect to its employment of the device of summary judgment. It does, however, insist that under our system of government, the right of the litigant to a defense grounded in federal law is not to be denied or abridged by a procedure which departs as radically from the minimum requirements of proper process as that recited in the pages which follow.

## STATUTE INVOLVED.

The statute involved is the Robinson-Patman Act, (Sections 13 and 13a, Title 15, U. S. C. A.), relevant parts of which are printed in full as Appendix B to this brief.

[5] In accordance with the proviso contained in Paragraph (a), Section 13, Title 15, U. S. C. A., (The Robinson-Patman Act).

## SPECIFICATIONS OF ERRORS TO BE URGED.

The Florida Supreme Court erred:

(1) In holding that the defense of illegality based on violation of the Robinson-Patman Act cannot be plead in an action in a state court, thus permitting enforcement of a contract which violated federal law.

(2) In ultimately affirming the judgment of the trial court that the Robinson-Patman Act "prescribes the only remedies available to persons affected by its violation" and that "under the decisions of the Supreme Court of the United States such defense cannot be offered in a suit to collect the purchase price of merchandise sold and delivered and affected by the provisions of that act."

(3) In affirming the judgment of the trial court in disregard of its first opinion and judgment sustaining the availability of the plea of violation of the Robinson-Patman Act.

(4) In denying to petitioner a right established by federal law without permitting petitioner an opportunity to make good its plea by the completion of the trial at law.

(5) In disregarding the rule in respect to the burden of proof which is an essential part of the federal right established by the Robinson-Patman Act.

(6) In giving effect to a minority opinion which sanctions a system of prices on its face discriminatory.

(7) In making a judgment which in effect treats a classification of customers by size as if it were a legally justifiable system of quantity discount.

(8) In not ruling that the standard contracts of American Can Company are on their face in violation of the Robinson-Patman Act.

(9) In refusing to remand to the Circuit Court of Hillsborough County, Florida, for trial the issues of fact raised by the defense sought to be interposed by petitioner.

## ARGUMENT.

### I. The Ultimate Judgment of the Florida Supreme Court, in Which It Records Its Answer to an Appropriate Federal Question, has no Support in the Law of the Land.

1. *The Florida Supreme Court has denied to your petitioner its right to a proper federal plea.*

The right invoked by your petitioner is established by the Robinson-Patman Act, paragraph (a), Section 13, Title 15, U. S. C. A., which makes it unlawful for any person directly or indirectly to discriminate in price between different purchasers of commodities of like grade and quality, etc. The only exception, as set forth therein, is as follows:

> "*Provided*, That nothing contained * * * shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

Although its prohibition is somewhat narrower, Section 13(a) makes it unlawful for any person engaged in commerce knowingly to be a party to any transaction which discriminates in favor of the competitors of the purchaser by means of any discount, allowance or otherwise. And a violation of this provision is made a crime to be punished by fine or imprisonment.

Petitioner defended the action against it in the Circuit Court for Hillsborough County, Florida, on the ground that the notes upon which recovery was sought were illegal and unenforceable for the following reasons:

(a) The notes were given in the course of a series of transactions for the purchase of cans; and the transactions were unlawful and the notes unenforceable, because the plaintiff, through its system of prices and otherwise, discriminated among its purchasers and to the detriment of

your petitioner, in violation of paragraph (a), Section 13, Title 15, U. S. C. A. (The Robinson-Patman Act);

(b) The plaintiff discriminated in favor of certain competitors, and to the detriment of petitioner, by furnishing to them equipment for closing cans and other special services and favors, all of which were denied to or charged against petitioner in violation of paragraph (e), Section 13 of the Robinson-Patman Act;

(c) The plaintiff discriminated against petitioner by allowing discounts to its more favored purchasers over and above any discounts allowed to petitioner, likewise in violation of the federal statute; and

(d) The plaintiff sold cans in Texas for less than in Florida in violation of Section 13a of the Robinson-Patman Act; the effect of all of which discriminatory prices and trade practices was substantially to lessen competition.

The judge of the Circuit Court for Hillsborough County, Florida, ordered a pre-trial conference for the purpose of exploring the issues. After a great deal of testimony was taken, but before the inquiry was concluded, he invoked the decisions of the United States Supreme Court; insisted that, under these decisions "the contract of sale was not . . . Malum in se but, Malum prohibita only";[6] ruled that the Robinson-Patman Act itself "prescribes the only remedies available to persons affected by its violation"; and held that the defense sought was unavailable. (R. 580, 582). So, in an opinion, which disregarded all testimony relative to the mercantile practices of American Can Company, he found for the plaintiff and entered a so-called summary judgment against petitioner.

This judgment, which narrowed the matter at issue to the question of the validity of the notes, was appealed. The Florida Supreme Court, in a carefully reasoned opinion, categorically held that the pleas presented a legal defense.

[6] As we pointed out in Footnote 3, *supra*, this may well be construed as a finding of fact against American Can Co.

It therefore reversed the judgment in order "that the issues raised by the pleas as they now stand, or are eventually settled, may be tried." (R. 593, 601). This determination of the issue was directly predicated upon the following decisions of this Court, cited and discussed in its opinion: *Bement & Sons* v. *National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, (1902); *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, (1909); *Pratt* v. *Paris Gaslight & Coke Co.*, 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458, (1897); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 63 Sup. Ct. 172, 87 L. Ed. 165, (1942). Of the seven members of the court, all of whom participated, only two dissented. One of these two, disregarding the issue of the availability of the defense sought, predicated his dissent upon the factual ground that "the sales contract which constituted a part of the plea was free of discrimination" and that "therefore the pleas were of no avail."

Upon rehearing, the Supreme Court of Florida, without affirming or reversing its holding on the federal issue of the availability of the defense sought, voted four to three to affirm the judgment of the court below. Of the four voting to affirm, one judge was of opinion that as a matter of law the defense sought was not available. Three judges were of opinion that "the defense attempted to be interposed was not available under the facts submitted in evidence to the court below." The three dissenting judges adhered to the former opinion and judgment of the court. Thus, whether the reason was that the defense of a violation of the Robinson-Patman Act was not pleadable in a state court, or whether—assuming its availability—petitioner was not under the undisputed facts entitled to raise it, it is clear that the Florida Supreme Court passed upon a federal question and disposed of a federal right.[7]

[7] The denial of the petition of defendant for a rehearing leaves this result undisturbed.

In any event the refusal of the Florida Supreme Court to permit petitioner to interpose the defense it sought clearly denied to it a privilege and immunity under the federal statute. The ultimate judgment is subject to challenge for these reasons:

(1) The judgment stands affirmed against petitioner in a state court when, had the identical issue been tried in a federal forum, the defense interposed would have been available and petitioner would have been accorded the right to establish it by evidence.

(2) The effect of the ultimate decision is to deny to petitioner a right which is established by common law and available under the provisions of the antitrust acts.[8]

*2. A right established by Federal Law is not to be abridged or denied by a serious departure from proper process in a State Court.*

As the case has been argued, it may not be necessary for the Court to consider this question. But a word is demanded because a judgment supported by a carefully reasoned opinion is replaced by a reversal of holding supported only by memoranda opinions. It is the more necessary because in reaching a common result members of the majority seem to have entertained different questions. The result could properly have been reached either by holding:

(1) That, as a matter of law, the defense sought to be interposed was not available in a state court; or

(2) That, in the face of contracts admittedly discriminatory, the undisputed facts disclosed by the pre-trial conference were not sufficient as a matter of law to constitute a defense.

One of the majority of four, seven judges sitting, held that the defense sought was not available in a state court. The other three, in a "per curiam" opinion, held that "The defense sought to be interposed was not available under the

[8] These two arguments are elaborated under Sections 2 and 3 of this title and under title II below.

facts submitted in evidence to the court below."[9] This, it seems clear, must be interpreted to mean that from the undisputed facts disclosed at the pre-trial conference the three judges concluded that as a matter of law the price system of American Can Company and the trade practices attending its operation did not violate the Robinson-Patman Act. Thus, whichever of the two be taken as the ground of judgment, a federal issue is presented.[10]

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[9] The rationale of the summary judgment by the trial court is tersely put by Thomas, J., in the first opinion of the Florida Supreme Court:

> "... the judge must have felt that he should enter a judgment because of a situation where questions of fact had been eliminated and only a question of law remained for his determination. Such a condition obtained so far as the plaintiff's case was concerned, but there is much in the record to indicate that issues of fact were not absent if testimony relative to the pleas were to be considered. In other words, the moment the issues raised by the pleas are contemplated disputed facts appear ... It is evident to us that the trial court thought it proper to enter the judgment pursuant to pre-trial conference on the theory that the facts supporting the declaration were not disputed and that conflicting testimony on the pleas would not preclude such a course inasmuch as the pleas being improper, the evidence relevant to them could be ignored." (R. 600-601).

[10] An analysis of the votes of the Florida Supreme Court is illuminating. In the original judgment, holding the plea valid and remanding the case Thomas, Brown, Chapman, Adams and Sebring, J.J., concurred; Buford, C.J., and Terrell, J., dissented. In the second judgment, affirming "the summary judgment" Terrell, Brown, and Buford, JJ., concurred in the proposition marked (2) above; Sebring, J., supported proposition (1); and Chapman, C.J., Thomas and Adams, J.J., dissented. It is, therefore, evident that the reversal was affected by a change of mind by Brown and Sebring, JJ. The incident is noteworthy because of the mystery which attends the abandonment of a tenable and the taking up of an indefensible position. In the decision after the reargument, four judges out of seven entertained a federal issue and voted to decide a federal question, three holding that as a matter of law the defense sought was available to the petitioner and one that it was not. The other three in their appeal to the record of the pre-trial conference in effect considered a federal issue and voted to decide a federal question; for their votes can be explained only through their insistence that the substantive federal question of the legality of the price system of American Can Company was upon uncontroverted testimony to be resolved in favor of the respondent.

However, if the "per curiam" opinion of the three judges is to be interpreted to mean that the Supreme Court of Florida was weighing conflicting evidence and deciding issues of disputed facts, it does abridge and deny a federal right by a serious departure from legitimate and proper process. The pre-trial conference was set up to clarify, not to resolve, issues in dispute. Furthermore, quite apart from the purpose it was intended to serve, the proceeding lacks all essentials of a fair trial of disputed issues. American Can Company refused in as many as fifty-five instances to produce documents or to permit cross-examination of witnesses. In Appendix C hereto, pp. 58-63, are quoted typical examples which reveal the absence of the essentials of a judicial hearing with respect to a finding on any disputed issue of fact.

If, therefore, the three-judge memorandum be interpreted as deciding any disputed issue of fact, it presents a case in which petitioner has been stripped of a federal right without a proper trial of the disputed issues of fact on which that right is founded.

3. *The Florida Supreme Court has decided a federal question of substantial importance contrary to the decisions of this Court.*

Whatever theory of the judgment is entertained, the record makes it clear that the outcome of this litigation turned upon the answer given to a federal question in the courts of Florida. The Circuit Court of Hillsborough County, Florida, held that the defense of violation of the Robinson-Patman Act was not available in an action in a state court. (R. 580-582).

The opinion runs as follows:

> "As to the defense of illegality of consideration or unlawfulness of the notes under the Federal Statutes, herein above mentioned, I am of the opinion that under decisions of the Supreme Court of the United States such defense cannot be offered in a suit to collect the purchase price of merchandise sold and delivered and affected by the provisions of that act. The act itself prescribes the only remedies available to persons affected by its violation and no other method or relief is to be had. The contract of sale was not under these decisions Malum in se but Malum prohibita only.
>
> "I am, therefore, of the opinion that all questions of fact and law on which the rights of the parties depend are settled in favor of the plaintiff and under Hillsborough County v. Sutton, 8 Southern 2nd, 401, this court should enter judgment in its behalf on the pleadings and facts disclosed by the record in this cause.
>
> "It Is, Therefore, Ordered, Adjudged and Decreed that counsel for the plaintiff is directed to prepare judgment [fol: 749] in favor of the plaintiff in accordance with the findings of this order and upon notice to counsel for defendant to present said judgment to this court for its signature." (R. 582).

On appeal the Supreme Court of Florida, reversing the lower court, held that such a defense was available and that the defendant was entitled to an opportunity to make out its case. Although they arrived at opposite results, the two opinions were alike bottomed upon the decisions of this Court. And whatever be the rationale of the Supreme Court of Florida in its second judgment—whether it held as a matter of law that the defense asked for was not allowable or whether it held that on the evidence taken at the pre-trial conference the trade practices in question did not violate the law—it concerned itself with a federal right, entertained a federal question, and entered a judgment in a realm where the decisions of this Court are authority.

The defense put forward by petitioner would have been available in a cause of action in a federal forum. The right

to such a plea is—as is elaborated below—definitely settled by decisions of this Court.

4. *The sound administration of justice demands of a state court, when called upon to interpret and apply a federal statute, a construction at harmony with that given to it in the federal courts.*

Here a situation is presented which is the converse of that resolved in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938). That case decided that, when called upon to interpret and apply state law, the federal court should follow the decisions of the highest court of the state in question. In the trial of the present cause, the petitioner put forward as a defense a privilege and an immunity conferred upon it by a federal statute. The rationale of the *Erie* case would seem to demand a disposition of the proposed plea by the Supreme Court of Florida in harmony with that which would be accorded it in the federal courts.

In the situation presented here the need for uniformity stands out the more sharply. The criticism of the *Erie* decision has been that, if the federal court follows the courts of the several states, it will be at the expense of a chance at uniformity the country over. Here it is a nationwide uniformity in the interpretation of a federal law which the rationale of the *Erie* case will serve. Thus the logic of that holding unites with the criticism of it to demand that the state court follow the federal decisions. The rule of harmony sought here can come only from the United States Supreme Court.

## II. In an Action in a State Court to Collect Promissory Notes Given as Consideration for Purchases in Interstate Commerce at Prices Which Through Their Discriminatory Character Tend Substantially to Lessen Competition, It is Proper for the Defendant to Plead That Such Notes are Unenforceable to the Extent That the Transactions on Which They are Based Violate the Robinson-Patman Act.

1. *The plea of restraint of trade as a defense in an action at law is the oldest and best established of the devices for enforcing what we now know as the antitrust laws.*

Although it dates from "time immemorial," the rule against restraints came into the law in the period marked by the breakup of the guilds and as a protest against the exclusive privileges that these "brotherhoods" enjoyed. It was gradually elaborated out of defenses allowed in actions brought at common law. The courts, by harkening to the defendant's plea of restraint of trade, refused to entertain suits against parties who sought their help in creating or maintaining restraints. A writ of trespass was refused to two schoolmasters, who complained that a third had set up a shop in competition.[11] A writ of trespass on the case was refused the Prior of Dunstable against a butcher who, instead of employing my lord's market, sold meat at his own house.[12] In an action for debt—an exact parallel to the instant case—a writ was refused[13] one John Dyer, against a rival who had bound himself by contract not to use "his art of the dyer's craft."[14] And the writ of assumpsit was held not to be available to a person who sought

[11] The Schoolmaster's Case, Y. B. Hen. IV, f. 47, pl. 21 (1416).

[12] The Meat Market Case, Y. B. Hen. VI, f. 19, pl. 13; f. 25, pl. 2 (1433).

[13] The Dyer's Case, Y. B. 2 Hen. V, f. 5, pl. 26 (1415).

[14] Note also, as directly in point, the Blacksmith's Case, 3 Leon. 217, 74 Eng. Rep. 643 (1587).

to hold another party to a restrictive covenant.[15] In fact the "defense sought to be interposed" was not limited to particular causes of action; or the contrary it was available under the whole range of the ancient writs. It was, in fact, out of the acceptance or rejection of causes of action that the common law rule against restraints developed.

In this manner a host of holdings were eventually brought together into the Statute of Monopolies. The prohibitions of this Act are legislative only in a formal sense; it is in essence a garnering of common law holdings into the classic statement of the rule against restraint.[16] It professes to do no more than declare "the ancient and fundamental law." It recites the evils of old by which persons were "hindered, grieved, disturbed or disquieted" in their trades; provides that all suits involving restraint or monopoly shall be "forever hereafter examined, heard, tried and determined" by and according to the common law of the realm and not otherwise. And it goes so far as to provide that as a defense against an accusation of restraint of trade, even the grant of a monopoly by the Crown was not to prevail.[17] Thus, as the common law was elevated above the royal prerogative, the defense of restraint of trade was given a validity as broad as the catalogue of actions at law.

2. *The Sherman Act carries over the common law rules against restraints and makes this body of law applicable in actions concerned with commerce among the several states.*

For lack of space, no more than a shorthand account of how the common law against restraints was converted into a federal statute can be recited here.[18] After some months

[15] An Anonymous Case, Moore 115; 72 Eng. Rep. 477 (1578).

[16] 21 Jac. 1, ch. 3 (1623-24).

[17] The royal grants which were to be recognized by the courts were specified in the Statute itself.

[18] The steps in the conversion of common law rules into the federal statute can be followed in the debates of the Fifty-first Congress on the Sherman Bill as recorded in THE CONGRESSIONAL RECORD. A short account is to be found in Temporary National Economic Committee, Monograph No. 16, "Antitrust in Action," Sec. 1, Subsec. 2.

of hectic debate, "the Sherman bill," originally aimed at abating the trusts, had been amended into an omnibus sort of measure pleasing to no one. As the summer recess became imminent, the Senate, in a last desperate move, referred the bill, not to the Finance Committee whence it had come but to the Judiciary Committee. In less than a week this Committee returned to the Senate a very different bill. It had stripped from the measure sent to it all the provisions of substantive law and in their stead had recited the common law rules against restraint. The terms of the common law seemed more comprehensive, flexible, and adaptable to the changing circumstances of life than the more concrete definition of wrongs which Congress had tried vainly to phrase. The formal recitation seemed to the Committee—and to the Congress—to be necessary, for at the time it was a matter of general belief that there was no common law of the United States, and that a statute was necessary to put the ancient rules within reach of the federal courts.

The real novelty was to fit out the ancient law with additional remedies. Nothing was set down to deny, impair or abridge the techniques of enforcement which had always been inseparable from the rules themselves. As yet the administrative process had won little foothold in national or state government; it was, in a day when laissez-faire was still dominant, the thought to make the statutes in respect to trade and commerce self-enforcing and so far as possible to keep the government out of business. So, a remedy was lifted bodily out of the Statute of Monopolies; and, as a supplement to the plea of restraint as a defence, the person injured by a restrictive conspiracy or covenant, was encouraged to bring offenses to the attention of the courts by a promise of three times his damage and costs, if he made out his case. The Congress was in earnest; and, in addition to reliance upon private litigation, it sanctioned resort to official action. To that end it provided the government with access to equity, sanctioned a libel on the goods

shipped in violation of the act, and elevated the offense of restraint of trade into the category of crime. As at common law, so under federal statute, no court was permitted to entertain any suit which would treat as lawful any transaction which was in restraint of trade.[19]

3. *The Robinson-Patman Act specifies and spells out in detail the restraint of trade forbidden alike at common law and under the Sherman Act:*

The Sherman, the Clayton, and the Robinson-Patman Acts are alike in kind, in intent, in the actions they outlaw. The three, with some minor measures, are commonly referred to as "the antitrust acts." In legislative language the Clayton is set down as a "supplement to" the Sherman Act, and the Robinson-Patman Act as an "amendment to" the Clayton Act. The purpose of all the acts is to outlaw various forms of conduct which impose, or threaten to impose, on the national economy departures from the competitive pattern. Thus the Sherman Act, employing the language of the common law, is directed against restraint of trade; the Clayton and the Robinson-Patman Acts, substituting a more modern idiom, are concerned to outlaw particular practices the effect of which is "substantially to lessen competition." The anti price-discrimination provisions of the last mentioned Act do no more than enumerate an item clearly comprehended within the blanket condemnation of the Sherman Act.

In all of this the law of antitrust has taken its natural course. It is no cause for surprise that the legal creation of petty trade has been elaborated to meet the conditions of

[19] The courts have quite consistently upheld the availability of the plea of restraint of trade under the Sherman Act. *Bement & Sons* v. *National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, (1902); *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, (1909); *Pratt* v. *Paris Gaslight and Coke Co.*, 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458, (1897); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 63 Sup. Ct. 172, 87 L. Ed. 165, (1942).

modern industry. It is quite obvious that price discrimination should have been singled out for legislative specification; for, in the margin between price and cost resides the business man's chance at survival; and any act of a seller of a producer's goods which disturbs equality of cost gives an unearned advantage to a favored party. This power of the dominant corporation to substitute a dual, or even a multiple, for a single price, has for decades been regarded by the Congress as one of the greatest sources of monopoly and of the concentration of economic power. For that reason it was, as early as 1914, by the Clayton Act singled out for special attention. And in 1936 the Robinson-Patman Act gave an even stricter mandate against a price-structure which through its discriminations disturbed the operation of our system of free enterprise.

It is, of course, true that the Robinson-Patman Act put new sanctions behind antitrust enforcement. But, as the novel remedies with which the Sherman Act was fitted out did not take away the pleas in defense which were the gift of the common law, the novel remedies of the Robinson-Patman Act did not deny or abridge the defenses available to the injured party before its passage. By the time of the passage of the Clayton and the Robinson-Patman Act, the way of administration had reason and experience behind it. A proof which would be easy under petty trade, where the facts were local and well-known, would be difficult in respect to a large corporation operating on a national scale. A suit which a small business man could maintain against a neighbor tradesman might impose an impossible burden if the adverse party was a far-flung corporate entity. If then the Congress called the government to the protection of the little fellow, its interest is not to be interpreted as taking from him the legal weapons with which he had been encouraged to put up his own fight. If the Congress had intended to take from the injured party an

ancient remedy, the Congress would doubtless have said so.[20]

Thus the whole history of antitrust legislation reveals a clear intent by the Congress always to strengthen, never to weaken, the prohibition against restraint; to throw additional defenses around the competitive system, not to strip from the small business man the resort to self-defense, when sued in court, which has been its right from time immemorial.[21]

The history of antitrust shows the Robinson-Patman Act to be an integral part thereof.[22] All through the years the Congress has been sensitive to the effects of the concentra-

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[20] In fact in the Clayton Act itself—see Section 16—the Congress did take from the shipper the right to an action at law in respect to an "unfair" railroad rate and did specifically limit legal challenge to the United States Government. In its stead the shipper was given the right of complaint to the Interstate Commerce Commission. The reason for the Congressional denial of the private cause of action was that resort to the courts by every individual who felt aggrieved carried a serious hazard to the administrative process. In this particular instance exceptional reasons demanded a departure from established practice; and the abridgement of an ancient right was made explicit by the legislature itself. The very writing into the statute of the exception is an acknowledgment that in other cases it stands.

[21] A decision of this Court has allowed the defense of restraint of trade to be interposed in a suit for an infringement of a patent. In that case the conduct prompting the initial legal action, belonging rather to tort than to contract, did not emerge in the course of a transaction between the parties. *Mercoid Corporation* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 64 Sup. Ct. 268, 88 L. Ed. 376, (1944); *Mercoid Corporation* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680, 64 Sup. Ct. 278, 88 L. Ed. 396 (1944).

[22] In the actions in the courts below American Can Company insisted that the defense sought was not available under the Robinson-Patman Act. There it granted, at least obliquely, that the defense was allowable at common law and admitted the possibility of its being available under the Sherman Act. But, it urged that differences between the Sherman and the Robinson-Patman Acts put the defense outside the reach of the defendant. It cannot be determined from the ultimate judgment whether this distinction was eventually accepted or rejected by the court below.

tion of economic wealth and power; all through the years the Congress has been solicitous lest conditions of survival be made intolerable for "the little fellow." Nothing along the way indicates an intent on its part to regard any of the new remedies it has created as a substitute for the right of a person to plead restraint of trade as a defense. To argue that its acts have closed to the victim of monopolistic practice the one practical and immediate avenue of redress—the right to a defense in his own local court when sued—is to pervert the intent of Congress.

4. *To deny the defense sought is to take from the victim of price-discrimination his most effective—often his only practical—remedy.*

In the absence of the defense sought, the small merchant or manufacturer is left without an immediate and practical remedy. The only direct move which he can make is to institute a new suit for triple damages in a federal court. The only other recourse is to file a complaint with the Department of Justice or with the Federal Trade Commission. In due course there may—or may not—emerge a criminal action, a suit in equity, or a cease and desist order seeking to end the abuses from which he suffers. A word about each of these alternative remedies is enough to show its inadequacy as an instrument of personal justice.

A. *The Suit for Triple Damages.*—At the time of the passage of the Sherman Act, the general belief was that the antitrust laws should be as nearly self-enforcing as possible. But the general reliance then put upon the suit for triple damages has not been vindicated by experience. Even if restraint can be shown,[28] the hazard of a proof of damages remains to be met. The conditions which impel a business enterprise towards growth or decay are many and various; to determine the exact place of the restraint in question among these, and to reduce to pecuniary terms the harm of

[28] Temporary National Economic Committee, Monograph No. 16, "Antitrust in Action," Sec. 2, Subsec. 6.

which it is the cause, imposes on a court an almost impossible task.[24] There is, in fact, little chance for a small business concern to win such a suit against a large corporation, unless the federal government has blazed the way with an action of its own.[25]

B. *The Criminal Action.*—Nor is a criminal action, instituted by the federal government, a remedy upon which a party in the situation of your petitioner can rely. The small concern can file a complaint with the Department of Justice. It has access to no process by which to compel the government to move; and, for any one of a number of reasons, the government may delay action or may never get around to the case. But, if it acts promptly and vigorously, the Department of Justice can not secure to the small business the relief it seeks. It is only as a deterrent that the criminal action is effective; and that does not operate to undo harm done in the past. Even as a future deterrent its efficacy is seriously impaired. For the profits which result from modern forms of restraint, such as price discrimination, are so huge and the penalties for violation of the antitrust laws so small that corporations such as American Can Company can afford to take chances.

C. *The Suit in Equity.*—The government's suit in equity is not shaped to the needs of the party in the situation of

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[24] *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 51 Sup. Ct. 248, 75 L. Ed. 544 (1931).

[25] Note that Congress has recognized these difficulties in Section 5 of the Clayton Act, Section 16, Title 15, U. S. C. A.:

"A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken."

petitioner. The complaint of the injured person does not institute it; it does no more than inform the Department of Justice. At best the suit, if won, can do no more than enjoin the continuation of illegal practices; it can not be made to reimburse the party wronged for the excess in price already exacted. Nor can it be made to compensate for the weakening of competitive position which unlawful charges have imposed.

D. *The Cease and Desist Order.*—Almost the same statement is to be made about the cease and desist order. It is not a writ to which, as a matter of right, a party injured by unlawful discrimination has a right. The process leading to its grant is instituted by the Federal Trade Commission; the injured person can do no more than file a complaint. Like the decree in equity, it is preventive of future wrongdoing rather than compensatory of harm already suffered. Its prohibitions may often be circumvented by ingenious revision of the trade practices outlawed. However stern its language, its mandate is in practice no stronger than the system of police with which it is followed up.

There is, therefore, available to the victim of a system of price discrimination only one effective remedy—the defense put forward in this case. If that remedy is held to be within his reach, he is in a position to fight his own legal battle. He may refuse to pay for the goods so long as the price made to him remains unlawful. The small processor, in the position of Bruce's Juices, Inc., is dependent upon the large corporation, such as American Can Company, for a raw material without access to which he can not carry on his business. The deal is to him not a matter of choice, but of compulsion; to break the tie is to invite himself to fold up. The relationship is a corporate feudal tie.

The state court, by its denial of the remedy sought, in effect interposes its veto to the enforcement of federal laws; confers a sanction upon transactions which federal law pro-

hibits; and aids and abets conduct which federal law holds to be a crime.

**III. The Pleas—As Clarified and Supported by the Unfinished Pre-Trial Conference—Are Sufficient to Require the Lower Court to Submit the Issues of Price Discrimination to Trial on Their Merits.**

1. *The allegations in the pleas are sufficient to demand that the issues raised be submitted to trial.*

The question of price discrimination, as presented here, may be resolved into three closely connected issues:

(a) Was the system of prices, with its schedules of discounts, as operated by American Can Company a true system of quantity discount, legally grounded upon differences in cost, or was it a system for the classification of customers by size which it was the very purpose of the Robinson-Patman Act to outlaw?

(b) Did price discrimination, other than the so-called "quantity discount," attend the operation of American Can Company's price system?

(c) Apart from favoritism in respect to price, were other forms of discrimination practiced by the American Can Company? The system of quoted prices may itself be violative of the Act; or practices which attend purchase and sales may violate the Act by turning quoted prices into fictions.

To explore the sufficiency of the allegations, the pleas of petitioner set forth, with due circumstance and detail, the following types of unlawful discrimination:

(a) That American Can Company engaged in direct discrimination in that the prices charged petitioner were higher than those made to its larger competitors. (R. 4-5).

(b) That American Can Company furnished to certain customers equipment, for the closing of cans without cost while it charged the petitioner therefor in violation of paragraph (e) of Section 13 of the Act. (R. 5).

(c) That discounts of 5 per cent were allowed to the California Packing Corporation and to Stokely Brothers and Company, Inc., both of which have branch plants in Tampa where petitioner's plant is located; and that to petitioner was refused the same—or in fact any discount—on purchases in similar amounts. (R. 6).

(d) That American Can Company illegally favored a number of petitioner's larger competitors—among them the California Packing Corporation; Stokely Brothers and Company, Inc.; the Hawaiian Pineapple Company; Libby, McNeil and Libby, Inc.; and the Great Atlantic and Pacific Tea Company—by allowing to each of them, and denying to petitioner, discriminatory discounts of from 3 per cent to 5 per cent on all purchases. (R. 6-7).

(e) That from its factory at Tampa, Florida, the American Can Company delivered cans without cost to the plants of the California Packing Corporation and of Stokely Brothers and Company, Inc., while petitioner was required to pay all delivery charges. (R. 6-7).

(f) That the American Can Company sold cans in Texas at prices lower than those exacted in Florida in violation of Section 13a of said Act. (R. 7).

These pleas set forth in detail facts which, if true, show beyond question the violation of various sections of the Robinson-Patman Act.

2. *The testimony taken at the unfinished pre-trial conference, instituted for the sole purpose of exploring and clarifying the issues to be tried, discloses no undisputed facts or admissions by petitioner which would justify a summary judgment in the absence of trial.*

In response to the defense put forward, counsel for American Can Company sought, through a series of motions, to attach compulsory amendments to petitioner's pleas, alleging a great many additional facts. At this point the trial judge discovered that—with the initial question,

the federal issue raised, and the amendments proposed to the defendant's pleas—the case was becoming unusually complicated. Accordingly, on his own motion, he ordered a pre-trial conference. (R. 37-39, 57-59). Its purpose was "to simplify the issues . . ., to determine the necessity or desirability of amending the pleadings, to obtain admissions of fact and of documents which will avoid unnecessary proof, and to limit the number of witnesses." The order further provided "that either party . . . is authorized and empowered to take necessary depositions. . ." Objections to proposed interrogatories were to be ruled on by the court before any witness was required to answer. (R. 37-39).

At this pre-trial conference the facts disclosed by the evidence—so far as it was taken—failed to show any admission by petitioner which would justify a summary judgment against it. Instead, the evidence introduced, incomplete as it was, established a prima facie case in respect to many of the discriminations complained of. (R. 65-83, 571-579).

The officials of the American Can Company admitted a lack of uniformity in respect to the equalization of freight charges between competitive points. (R. 148). They admitted that freight deductions were sometimes allowed for other reasons which they were able to determine, (R. 149); that the profits of "equalization" and even of "special rates" were given to special customers and withheld from others; that such favors continued during the life of the contract with the particular purchaser (R. 172-173); that usually such concessions were made orally, though once in a while confirmed by letter. (R. 173). A request was made by petitioner for the production of letters revealing the favored customers; the witness was instructed by counsel not to answer; the question was certified to the trial court. (R. 173-174). It was also admitted that substantial discounts were allowed solely on the basis of aggregate quantity sales. (R. 367-368).

*3. If there was jurisdiction to render a summary judgment, the rule of the Robinson-Patman Act in respect to burden of proof would compel judgment on the record in behalf of the defendant.*

In respect to the claims of unlawful discrimination the record presents substantial issues of fact which must be submitted to trial. However, the record in the instant case on its very face discloses a record which illegally discriminates against the small customers of American Can Company and to the advantage of their larger competitors.

The testimony of the general counsel of American Can Company which, it is submitted, is conclusive on this point, is presented in Appendix D to this brief. (R. 571-579). In its revealing detail it constitutes a succinct disclosure of the unlawful character of the prevailing price system. Other testimony to the same effect is found in R. 209-219, 234-245, 506-507.

At the outset it is admitted that the burden of proving that the difference in price charged to Bruce's Juices, Inc., and to its large competitors must be justified by a showing of difference between them with respect to cost. In assuming that burden, the general counsel testified that at the time it was passed in 1936, its price system was illegal under the Robinson-Patman Act. To remedy this situation the company abandoned its device of quantity discount and substituted therefor a system of classifying purchasers into the three classes of "the largest customers, the middle-sized ones, and the smaller ones." (R. 572-573). All customers whose purchases run to less than $500,000.00 a year receive no discount; those whose purchases are between $500,000.00 and $7,000,000.00 receive from ½ per cent to 4 per cent discount; those whose purchases amount to or exceed $7,000,000.00 receive a 5 per cent discount. As a result expenses are not apportioned by customer or even by plant; they are hypothecated for the class of customer. (R. 241). For example, against the small purchasers is set down an item of expense for "commissions," although it is admitted that in Florida no commissions were required to be paid. (R.

510, 576). Such a classification is the very type of offense at which the anti price-discrimination provisions of the Robinson-Patman Act was aimed. He admitted that such differences in price were not to be justified by differences in the cost of manufacture. Accordingly in the search for a rationale by which to make legal this system of classifying customers, it resorted to differences in selling costs. And since, as he admitted (R. 572-574), the company lacked adequate empirical data, it fell back, as a substitute, upon a system of cost accountancy which, as the paragraphs below will reveal,[25a] rested upon no more secure foundation than hypothesis.[26]

This method of proving cost had the merit of simplicity. It disregarded the actual expense of serving individual pur-

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[25a] A comprehensive discussion of the kind of mercantile practices which are at issue here is to be found in a collection of articles bearing the title of "Price Discrimination and Price Cutting" which make up the number of *Law and Contemporary Problems* for June, 1937.

[26] A pertinent, in fact the classic example, of the maze into which the argument is driven when a legal judgment is made to turn upon the intricacies of cost accounting is presented in Federal Trade Commission Docket No. 2116, *In the Matter of the Goodyear Tire and Rubber Co.* In respect to the justification of prices made by Goodyear to Sears Roebuck & Co. which was lower than that made to dealers who handled the tire which bore the Goodyear name, the whole accountancy system of Goodyear was subjected to administrative scrutiny. Needless to say there was in respect to every single item of expense a wide diversity of views between the experts representing Goodyear and the Commission. The elusive character of such a proceeding was one of the chief arguments for the rule in respect to the burden of proof instituted by the Robinson-Patman Act.

A kindred example of the treacherous use of cost accountancy as a basis for legal distinction is presented by the public utility cases. As Mr. Justice Black, dissenting, cogently remarked in *McCart v. Indianapolis Water Co.*, 302 U. S. 419, 428-429, 58 Sup. Ct. 334, 338, 82 L. Ed. 336, 343, (1938):

> "Wherever the question of utility valuation arises today, it is exceedingly difficult to discern the truth through the maze of formulas and the jungle of metaphysical concepts sometimes conceived, and often fostered, by the ingenuity of those

chasers of cans. The time spent by salesmen on each customer was lumped for the class as a whole and then distributed pro rata. (Appendix D, p. 65-66). Following the same principle, commissions which were paid to some customers and not paid to others were pro rated as charges against all the customers of the class. (Appendix D, pp. 68-69).

Thus, by the simple device of disregarding the actual cost of particular transactions and charging small Customer A with expense caused to American Can Company by small Customer B, American Can Company proved that the cost of serving all small customers was greater than the cost of serving large ones. As a result it claims the right to make a discrimination in price between Bruce's Juices, Inc., and its larger competitors without reference to the actual difference in the expense of sale.

In this way a system of price discrimination is admittedly set up and frozen against change. Such a system has no relation to actual cost. Under its unbending strictures it is impossible for a small customer to escape his discriminatory classification into which he has been put by increased efficiency. Large corporate buyers may lump the purchases of their widely-scattered subsidiaries in order to gain the advantage of a discount. Smaller customers are not permitted to form a cooperative buying organization to secure a like competitive advantage for themselves. (Appendix D, p. 68). No customer is permitted to improve his discount position by actually reducing the expense incurred by the

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who seek inflated valuations to support excessive rates. Even the testimony of engineers, with wide experience in developing this theory and expounding it to the courts, is not in agreement as to the meaning of the vague and uncertain terms created to add invisible and intangible values to actual physical property. Completely lost in the confusion of language—too frequently invented for the purpose of confusing—commissions and courts passing upon rates for public utilities are driven to listen to conjectures, speculations, estimates, and guesses, all under the name of 'Reproduction costs.'"

American Can Company in serving him. (Appendix D, p. 69). This is the system put forward by American Can Company to sustain the burden of justifying the difference in price to small and large buyers. It seems obvious that such a system of classification violates the very purpose of the proviso permitting a difference in prices based on cost of serving. As pointed out by Senator Logan, a sponsor of the bill on the floor of the Senate, no merchant was to be deprived of the advantages which his superior efficiency gave him.[27] Yet the system of American Can Company puts an efficient small merchant under a permanent disadvantage by allocating to him the costs of inefficient concerns whose purchases are of the same size.

This system of the classification of customers should have been revealed at the pre-trial conference in the detail of its colorful operation. Yet, while admitting the burden of proof was upon American Can Company, to show justification, the corporation refused to permit its witnesses to be cross examined with respect to the amounts received by way of discount by the larger competitors of petitioner. It also refused to permit examination of its books with respect to the amount of discounts actually paid. This refusal amounts to total failure with respect to sustaining the burden of proof imposed by law upon American Can Company.

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[27] Senate Journal for April 28, 1936, 6281. Mr. Logan: "I will say very frankly to my colleague that there is no way by legislation to afford protection to the less fortunate or less efficient merchant under a condition such as that.

"We may go as far as we can to protect him, but if there be one merchant who is efficient, who saves by discounting his bills, and desires to use that saving by passing it on to the public, the man who cannot secure such advantages is apt to go under sooner or later, and we cannot help him by law.

"This bill attempts to bring about fair treatment among those who are in the same condition. We cannot prevent efficiency; we cannot stop progress. Those who are efficient, those who are good businessmen, those who are skillful in their business are not restrained in any way. That is true even of the large seller and of the manufacturer."

The ground for the refusal of this vital information was that the amounts of discounts to larger competitors were confidential. In the light of the company's past record in respect to price discrimination, this reason seems frivolous.[28]

Other typical instances of the refusal of American Can Company to disclose essential information is presented in Appendix C, pp. 58-63.

It is submitted that this price system on its face violates the prohibition of the Robinson-Patman Act. Repeatedly it has been so held by the Federal Trade Commission. *Simmons Company*, Docket No. 3840; *Master Lock Company*, Docket No. 3386; *H. C. Brill Co., Inc.*, Docket No. 3299; *American Optical Company*, Docket No. 3232; *John B. Stetson Company*, Docket No. 5172.

When a prima facie case of discrimination is shown, the accused corporation must, by a showing of lower cost with volume of sales, demonstrate that the quantity discount falls within the exception permitted by law. *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th) 1930.

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[28] For example, in the case of *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th), certiorari denied 282 U. S. 899, 51 Sup. Ct. 183, 75 L. Ed. 792 (1930), we find the following in the Court's opinion:

> "Defendant made two contracts with Van Camp on the same day, one a secret agreement which contained provisions for rebates and allowances not found in the simultaneously executed agreement on the same subject. Defendant told plaintiff and all other purchasers, save Van Camp, that its prices were the same to all, and it did not permit its own sales force to know of the secret agreement with Van Camp. From these findings the jury could have readily found that defendant did not in good faith cut its price to Van Camp because of the latter's volume of business.
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> "Defendant's argument that it feared a rival might take away the Van Camp business and, therefore, the discrimination was justifiable because made in good faith to meet competition, is not supported by persuasive testimony. Likewise, its asserted fear that Van Camp might go into the tin can producing business could well have been rejected by the jury as its reason for the favoritism shown Van Camp. While a

See also *Swift & Co.* v. *Wallace*, 105 F. (2d) 848 (C. C. A. 7th) 1939; *Oliver Bros., Inc.* v. *Federal Trade Comm.*, 102 F. (2d) 763 (C. C. A. 4th) 1939; *Hansen Packing Co.* v. *Armour & Co.*, 16 F. Supp. 748 (S. D. N. Y.) 1936.

Moreover, the system of classification of customers by aggregate volume of seriatim purchases in issue here is a discrimination analogous to "the basing point pricing system" held unlawful alike by the Federal Trade Commission and by this Court. *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U. S. 746, 65 Sup. Ct. 971, 89 L. Ed. 989 (1945); *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 65 Sup. Ct. 961, 89 L. Ed. 977 (1945).

We submit that if the record at the preliminary hearing be considered as a trial, the burden of proof put by the Statute on the American Can Company has not been met. Certainly it is not met by a cost accounting system made-to-order, whose very purpose is to provide a justification for

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jury might perhaps have found for defendant on both of these issues, the evidence was such as to call for their submission to a jury.

"We fully agree with defendant's counsel when they say that the executive officers of the manufacturing company and not a jury must decide whether the producer shall or shall not make price concessions to large consumers whose large demands make output more constant and thus lessen costs.

"But the right of defendant's officers to determine the necessity of granting price reductions to a large customer is one thing. The right (and the duty under the statute) to inquire whether a price reduction was in fact made because of volume of business or to meet competition presents an entirely different issue. . . .

*Cf. A. W. Feeser, Inc.* v. *American Can Co.*, 2 F. Supp. 561 (D. C., D. Md.), 1932; *C. F. Simonin's Sons, Inc.* v. *American Can Co.*, 22 F. Supp. 784 (E. D. Pa.), 1938, 24 F. Supp. 765 (E. D. Pa.), 1938, 26 F. Supp. 420 (E. D. Pa.), 1939, 30 F. Supp 901 (E. D. Pa.), 1939, 1 FRD 134 (E. D. Pa.), 1939; *Gibson Canning Co.* v. *American Can Co.*, 1 F. Supp. 242 (E. D. Ill.), 1932; *George Van Camp & Sons Co.* v. *American Can Co., et al.*, 278 U. S. 245, 49 Sup. Ct. 112, 73 L. Ed. 311, 60 A. L. R. 1060, 30 F. (2d) 1011 (C. C. A. 7th), 1929.

its own system of price discrimination.[29] Even more certainly the burden of proof is not met when American Can Company refuses to disclose the detailed information on which its cost accounting system is based.

The rationale of the burden of proof in this type of case has been succinctly put in a comment entitled "The Robinson-Patman Act in Action," in 46 Yale Law Journal 447, 482.

> "To reduce the possibility of validating discounts through this Section, however, the burden of justifying the price variation is placed on the accused. It seems almost impossible to use the arbitrary premises and conflicting techniques of cost accounting to prove that a seller has realized economies in any particular sale. At best the issue can be framed only in terms of the predictable. Thus, a judge finds that a quantity discount might reasonably be expected in the long run to effect economies in the cost of production. But under Section 1 of the Act, the accused must 'affirmatively' show that a particular price differential is based upon a definite and certain calculation of cost savings effected in the sale under scrutiny. And because the Act makes no allowance for the predictable, the issue may often be determined against the party upon whom the burden of proof falls."

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[29] "Cost accounting procedure rests upon over-simplified and largely arbitrary fundamental analyses. In assessing the value of cost accounting service the cost accountants' own estimates of the utility of the unit costs which they find must not be taken too seriously. An examination of the procedures, reduced to formulae, whereby the unit costs are found, shows in many systems that the figures produced cannot possibly have the properties attributed to them; in many instances, indeed, it is incorrect to call them costs at all."—"Cost Accounting," by John B. Canning, Encyclopaedia of the Social Sciences, Vol. IV, pp. 475-478 (1931).

## IV. The Holding of the Florida Supreme Court, if Allowed to Stand, Would Impair the Enforcement of the Robinson-Patman Act; Seriously Weaken the Competitive Position of Small Business; and Promote a Concentration of Economic Wealth and Power in Contravention of Public Policy as Manifest in the Antitrust Laws.

The answer to the question posed by this suit is of importance in its effects upon litigation, the conduct of business, the pattern of the economy, the general welfare. It has been shown that the Robinson-Patman Act is a spelling out in some detail of the prohibition against restraint of trade. It follows, as of course, that a defense, which according to the decisions of this Court, is available when the offense is against the common law or the Sherman Act is also available when the offense is against the Robinson-Patman Act. The issue presented here may emerge in a case in any state in the Union; and the administration of justice demands that state courts the country over should be able to rule correctly upon the availability of the defense sought here.

The importance of this question transcends the interest of petitioner. If the victim of a flagrant violation of the Robinson-Patman Act, denied the opportunity to enter such a defense when sued, must in another action go into the federal courts to assert his right, the practical effect is to defeat to a large degree the purpose that Statute is intended to serve. The economic consequences of such a holding are serious. For then the only remedy which lies within the means, as well as the legal reach, of the small concern—that of a defense in his local court—is lost. As a result there will be taken from him a plea of restraint which since time immemorial has been among the ancient rights of the litigant. The results are of general concern; they should not—they cannot— be measured in terms of injustice done in the individual case.

To approve—and thus to convert into the law of the land—the judgment of the Florida Supreme Court is to enthrone a nationwide system of discriminatory trade practices. It is for this Court categorically to say whether the purpose of the Congress in outlawing discriminatory practices is to be compromised or even thwarted by a judicial denial of age-old pleas which are instruments of its realization. For a denial of the defense asked for involves the most serious consequences.

(1) The loss of a remedy, perhaps the most effective remedy, will rob the Robinson-Patman Act of much of its power of prevention. The victims of price discrimination will be denied the opportunity to defend themselves when in ordinary suits at law the transactions out of which such unlawful conduct emerges are already in court and the defense is most easy and certain. The vigilance of the wronged in the defense of their own right, upon which, among other sanctions, the enforcement of the antitrust laws has been rested, will be seriously impaired. And, since administrative action is uncertain and the triple damage suit too expensive for everyday use, the risks which attend violation will be materially reduced.

(2) As a consequence all small business will be put in jeopardy. The seller, who maintains a multiple price structure, will bring his suits in state courts, where the buyer can not fight back by pleading the discriminatory practices to which he has been subjected. The victim, however great the handicap imposed on him, can assert his rights only by instituting a new suit for triple damages in a federal court or by waiting for the federal government to come to his rescue. The triple damage suit is likely to prove protracted and expensive; damages caused by a disadvantageous competitive position are so speculative as to be usually unprovable. Nor can the buyer rely for protection upon the action of the government. The Department of Justice or the Federal Trade Commission may never get around to the matter. The suit in equity or the cease and desist order operates in respect to the future and does not afford him a remedy for

wrongs endured in the past. And, so long as he lacks his own remedy, lower prices, quantity discounts, special services, benefits of one sort or another denied to him will be available to his stronger competitor. At best, the small merchant can compete only under serious handicaps; at worst he is forced into bankruptcy.

(3) If this ruling is allowed to stand, a curious result will follow. Instead of the violator revising his system of trade practices to accord with the law, the injured party must adjust its affairs to trade practices which violate it. The victim will be compelled to seek an escape from the squeeze between cost and price which the seller, from which it must purchase, has the power to impose. If it is to secure the lower prices and the special favors essential to survival, it may be driven to become a subsidiary of its larger competitor. Or a number of smaller concerns may be forced to form a combination in order to secure treatment equivalent to that accorded "the most favored customer." In either event the move will be towards the result which it is the very purpose of the Robinson-Patman Act to forestall.

## CONCLUSION.

It follows that from any possible interpretation of the opinion of the Supreme Court of Florida your petitioner has been denied a federal right. The clarification of the limits of the federal right is of far-reaching public and economic importance. If a manufacturer, instead of establishing quantity discounts upon differences in costs, is permitted to allocate expenses in such a way as to justify an arbitrary classification of customers, the intent of the Robinson-Patman Act is perverted. If the defense sought in this action is not available to independent business concerns which are victims of discriminatory trade practices, the competitive position of industry the nation over will be seriously impaired and public policy as manifest in a federal statute will be defeated.

Your petitioner, therefore, prays this honorable Court that it remand the case to the Circuit Court of Hillsborough County, Florida, with the ruling that the plea of a violation of the price-discrimination sections of the Robinson-Patman Act by the plaintiff is a proper and legal defense in an action brought in a state court, and with the direction that the defendant be accorded his federal right to make good such a plea by trial at law.

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# APPENDIX A.

## Opinions of the Supreme Court of Florida.

[R. 593-601.]

IN THE SUPREME COURT OF FLORIDA,
JUNE TERM, 1944.

EN BANC

HILLSBOROUGH COUNTY.

BRUCE'S JUICES, INC., *Appellant*,

v.

AMERICAN CAN COMPANY, *Appellee*.

An Appeal from the Circuit Court for Hillsborough County,
L. L. Parks, Judge.

Cody Fowler and Shackleford, Farrior & Shannon, for Appellant.

John M. Allison, Harry B. Terrell and Whitaker, Whitaker & Terrell, for Appellee.

OPINION—Filed October 20, 1944.

THOMAS, J.:

An action on promissory notes culminated in a judgment for the plaintiff, and the defendant appealed.

Inasmuch as no question presented here for determination requires an analysis of the declaration, we shall proceed immediately to give a condensation of the pleas which appear to have given rise to the questions, four in number, which we must decide.

The first plea set out that notes were given for cans purchased from the payee by the maker and that the transaction was unlawful because the former "while engaged in commerce among the several states, directly and indirectly discriminated in price between different purchasers of * * * cans of like grade and quality, * * * sold for use and resale within the United States * * *" the effect of which "was

substantially to lessen competition or tend to create a monopoly * * * and to injure, destroy and prevent competition with certain customers of * * * Defendant in violation of paragraph (a) of Section 13 of Title 15, United States Code * * * ."

The second plea contained the allegations that the discrimination was "in favor of certain purchasers of * * * cans, and against the Defendant, a competitor of such purchasers, which cans were bought for resale in interstate commerce by furnishing to such purchasers * * * equipment for the closing of cans * * * without cost or charge * * * while charging rent for said equipment furnished to the Defendant, in violation of paragraph (e)" of the same section and title of the code.

In the third plea it was averred that there was discrimination by the allowance of discounts "to * * * purchasers over and above any discounts * * * available at the time * * * to * * * the Defendant and others similarly situated in respect of the sale of * * * cans, of like grade, quality and quantity, in violation of Section 13a" of the same title of the code. This plea is amplified by the statements that two companies in the same business of canning juices in Tampa and selling their products throughout the country as competitors of defendant were allowed a "large and discriminatory discount (5 percent)" not available to it and were relieved of delivery charges which defendant was required to pay; that three other companies selling products in competition, but evidently not canning in the state, were likewise favored.

In the fourth plea it was charged that plaintiff sold cans in Texas for less than in Florida in violation of Section 13a, supra.

The appellant has observed in the brief that we need not, in our consideration of the controversy, make "any reference to the voluminous testimony set forth in the record inasmuch as the Trial Court took the position * * * the defense of illegality * * * was not available" and "correctly stated the gist of the defenses" as the illegality and unenforceability of the notes "because the transaction in which they were executed (was) unlawful because plaintiff violated the Robinson-Patman Act, U. S. C. A., Title 15, Section 13." The court concluded that the defense could not be presented for the reason that the federal statutes prescribe the only available remedy, and transactions in viola-

tion of these laws are not "Malum in se but Malum prohibita only."

The initial question challenges the ruling of the circuit judge that any remedy secured to the defendant by "the Sherman Anti-Trust Law as amended by the Clayton Act and as amended by the Robinson-Patman Act" could not be employed as a defense to a suit in the state court on the notes, but could only be asserted in an action for affirmative relief in a federal tribunal. In the second, third, and fourth questions, respectively, appellant asked: "Where the consideration of notes is dependent upon a transaction which is illegal, may recovery nevertheless be had * * * upon the theory that the notes constitute a distinct contract based upon a valid consideration?" and "Is a contract which is founded on a violation of a penal statute void even though it is not expressly declared void by the statute?" and "Was it necessary that the evil intended to be prohibited by the anti-trust statute be malum in se in order to render the contract; which was in direct contravention of the act, void and unenforceable?"

It should be pointed out here that there is an apparent discrepancy between the first question and the pleas we have digested, for the former relates to three acts of the Congress, i.e., the Sherman Anti-Trust Law and the Clayton and Robinson-Patman Acts, but the latter refers only to Section 13a and paragraphs (a) and (e) of Section 18, Title 15, U. S. C. A. As we understand it, the laws cited in the pleas are parts of the Clayton Act as amended by the Robinson-Patman Act, and not parts of the Sherman Anti-Trust Law.

Bearing in mind the observation of the trial judge, conceded by appellant to be accurate, concerning the nature of the defenses, the statement of the appellant about the needlessness of any reference to the testimony, and the character of the questions posed, we conclude that the questions we must decide are actually two, i.e., whether (1) remedies furnished by the Clayton and Robinson-Patman Acts may become defenses in a suit on promissory notes to cover the purchase price of articles alleged in the pleas to have been sold in violation of those laws, and (2) the sale and the notes constituted separate transactions. We shall confine our discussion accordingly.

To avoid confusion we wish expressly to repeat that but three portions of the code are thus involved, Section 13a

and paragraphs (a) and (e) of Section 13. They brand as unlawful transactions which by differentials in sales price, rebate, discount and the like result in discrimination between purchasers and tend to create monopolies and stifle competition.

Appellants open their challenge with a reference to a decision of the Supreme Court of the United States rendered in 1901, Bement and Sons v. National Harrow Company, 186 U. S. 70, 22 S. Ct. 747, 46 L. ed. 1058. Action had been instituted in the New York State Court for damages arising from breach of contract for the sale of farm implements, and the plaintiff had recovered. The court observed that the sole federal question involved, in the appeal from an opinion of the court of appeals affirming the judgment, was the validity of the contracts in view of the act of Congress designed to protect trade against unlawful restraint (Sherman Anti-Trust Law). The plaintiff had taken the position that only the Attorney General of the United States could bring an action under the statute, except that under one section of it (7) any person aggrieved might himself sue in a federal court. Reaction of the court to this contention was: "Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that anyone sued upon a contract (this action originated in the state court) may set up as a defense that it is a violation of the act of Congress, and, if found to be so, that fact will constitute a good defense to the action." So when this decision was made it was definitely held that the defendant in a suit in a state court on a contract offending against the Anti-Trust Law could take advantage of the infringement by plea.

As late as 1942 this principle was again recognized by the United States Supreme Court when in Sola Electric Company vs. Jefferson Electric Company, 317 U. S. 173, 63 S. Ct. 172, 87 L. ed. 165, Mr. Chief Justice Stone wrote: "This Court has declared that anyone sued upon a contract may set up as a defense that it is in violation of the Sherman Act. E. Bement & Sons v. National Harrow Co." He added that it had been decided "in Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227, 53 L. ed. 486, 29 S. Ct. 280, that a vendee of goods purchased from an illegal combination in pursuance of an illegal agreement, both in violation of the Sherman Act, can plead the illegality in defense to a suit for the purchase price."

The Supreme Court of New York in the case of Remington Rand v. International Business Machines Corporation, 3 N. Y. S. 2d. 515, referred to the decision in the Bement case, supra, and announced the rule that a litigant in a state court could not rely upon the federal statute for affirmative relief, but could resort to it as a defense in an action on a contract executed in contravention of that law. While the decisions we have so far cited dealt with the Sherman Anti-Trust Law, the Supreme Court of New York reiterated the rule in Stock and Sons v. Jacobson, 18 N. Y. S. 2d. 200, where the defense was predicated upon the Robinson-Patman Act.

The same general principle was applied in Pratt v. Paris Gaslight and Coke Company, 168 U. S. 255, 42 L. Ed. 458, when it was held that jurisdiction of a state court was not affected by an issue of the invalidity of a patent as an incident to a defense, although that court could have exercised no jurisdiction had the matter been presented to support a recovery.

The appellee insists that there are vital distinctions between the Sherman Anti-Trust Law on the one hand and the Clayton and Robinson-Patman Acts on the other that preclude application of the same rule relative to defenses interposed under both. At the outset he contends that "contracts, conspiracies and combinations" under the former were inherently illegal at common law, while "discriminations in price, services, facilities, discounts, rebates, etc., were not unlawful at common law and * * * became so under Federal laws for the first time by adoption of the" latter. Upon turning to 41 C. J. page 99, given as authority for the first statement, we find the language: "All contracts, combinations, or agreements which create or *tend to create* a monopoly are unlawful at common law * * *," yet the words underscored are identical with the ones appearing in Section 13, supra, under which one of the pleas was filed.

Among authorities given for the text is our decision in Stewart et al. v. Stearns & Culver, 56 Fla. 570, 48 So. 19, where was written: "The validity or invalidity of an agreement that in operation *tends to restrain trade or to monopolize* is in general determined by the element of whether it is or is not injurious to the public. If injurious in any perceptible degree to any considerable portion of the public, the agreement is contrary to public policy, and will not be enforced." (Again we have supplied italics.)

We do not find such difference between the phraseology of the Sherman Anti-Trust Law and the subsequent two acts as would justify a ruling that violation of the one could be employed as a defense, but a violation of the others could not. When the real design of laws of this character is borne in mind, Stewart et al. v. Stearns and Culver, supra, any difference between the one and the other two becomes quite obscure. It is our view that the availability of the defenses was properly decided in Stock and Sons v. Jacobson, supra.

But the principal distinction, so the appellee urges, derives from the dissimilarity in the language used because in the Sherman Anti-Trust Law is the statement: "Every (such) contract * * * is * * * declared to be illegal," while Section 13a, supra, merely provides: "It shall be unlawful for any person * * * to be a party to, or assist in, any transaction * * * which discriminates * * *." So it is argued that by the former the contract itself is illegal; by the latter only the discriminations are unlawful. Here, too, we fail to find such a contrast as would furnish sound reason for contrary rulings as to relevancy of the defenses.

Appellee stresses the opinion in Connolly v. Union Sewer Pipe Company, 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679, as authority for his position, but we believe careful study will reveal an essential difference between the factual situation there and here. Briefly, according to the cited case, purchasers of pipe attempted to defeat recovery upon notes they had signed to evidence the purchase price, because the seller had combined with other dealers in restraint of trade. The court found that the "purchases by the defendants had no necessary or direct connection with the alleged illegal combination," and that the defenses for that reason were not tenable. We think the criticism of disconnection between the alleged violation and the obligation there is not present here where the amount of the notes, if the pleas be true, was affected by the transgression claimed and the purchase price for which notes were given was enlarged by reason of the discrimination. See Continental Wallpaper Company v. Voight and Sons Company, supra.

From the authorities it appears that the courts will not lend their aid toward the enforcement of a contract which will further the violation of the law. If for that reason recovery will be denied the plaintiff where he and the defendant may both be parties to the contract in contravention

of the act, why would a defendant not a party, but a victim, be refused the same advantage? No reason occurs to us.

We reach the decision that the pleas, judging them by their substance, irrespective of any criticism as to their form, were appropriate, and in arriving at this view we have not overlooked the fact that the action was based on promissory notes instead of the contract for sale itself. That the suit was not based upon the contract, but upon notes which evidenced amounts due under the contract does not, in our opinion, alter the situation. Embrey v. Jamison, 131 U. S. 336, 9 S. Ct. 776, 33 L. Ed. 172.

No necessity appears for further discussion of the questions we analyzed in the beginning. We must, however, decide what procedure should be followed by the trial judge to effectuate our judgment. We have said that appellants remarked the uselessness of referring to the transcript. There is sharp difference of opinion between counsel on the matter whether the court determined the controversy on the facts as well as the law. Despite this contention of the appellant, the appellee has repeatedly alluded to the testimony.

The judge recited that the matter was being heard upon "application for entry of final judgment." He adjudged that plaintiff recover, stating in detail the amounts due on the notes for principal and interest and also for attorney's fees and costs. A few days beforehand he had entered his "order on pleadings and pre trial conference," concluding with the direction to counsel for plaintiff to prepare a judgment. It is largely from the recitals in this order that we glean the extent of his consideration.

There is no dispute about the plaintiff's having proved its case, so we need decide whether the judge thought recovery was justified despite testimony in support of the pleas, they being inappropriate, or was warranted even if the testimony were taken into account, it being insufficient.

Aside from the defense of conditional delivery, which has been abandoned, he observed: "As to the defense of illegality of consideration or unlawfulness of the notes under the Federal Statutes * * * I am of the opinion that under decisions of the Supreme Court of the United States such defense cannot be offered in a suit to collect the purchase price of merchandise sold and delivered and affected by the provisions of that act. The act itself prescribes the only remedies available to persons affected by its violation and no

other method of relief is to be had." He continued, as we have already quoted, "The contract of sale was not under these decisions Malum in se but Malum prohibita only." Then he concluded: "I am, therefore, of the opinion that all questions of fact and law on which the rights of the parties depend are settled in favor of the plaintiff and under Hillsborough County vs. Sutton, 8 Southern 2nd, 401 (150 Fla. 601) this court should enter judgment in its behalf on the pleadings *and fact* disclosed by the record in this cause." (Italics supplied.)

In the cited case was posed the question whether final judgment could be entered at the conclusion of a pre-trial conference, the procedure followed here. It appears to have been the ruling that such method was proper where material facts were not controverted. The court said: "If the conference progresses to the point of eliminating all questions of fact then the court may give judgment according to law on the facts before him." In the light of this rule, then, the judge must have felt that he should enter a judgment because of a situation where questions of fact had been eliminated and only a question of law remained for his determination. Such a condition obtained so far as the plaintiff's case was concerned, but there is much in the record to indicate that issues of fact were not absent if testimony relative to the pleas were to be considered. In other words, the moment the issues raised by the pleas are contemplated disputed facts appear. We think this is readily apparent from appellee's brief, where much space is devoted to the evidence. For illustration, we find in it the statement that it was "within the province of Judge Parks, who heard the * * * testimony * * * and saw the demeanor of this witness, to apply to his testimony the rule: '*Falsus in uno, falsus in omnibus,*'" etc., referring to a means by which may be judged the testimony of a witness whose statements are alternately true and untrue.

It is evident to us that the trial court thought it proper to enter the judgment pursuant to pre-trial conference on the theory that the facts supporting the declaration were not disputed and that conflicting testimony on the pleas would not preclude such a course inasmuch as the pleas being improper, the evidence relevant to them could be ignored. As we have reached a contrary view about the pertinence of the defenses, it seems fitting for the cause to be

reversed that the issues raised by the pleas as they now stand; or are eventually settled, may be tried.

The judgment is, therefore, reversed with directions for further proceedings conformable to this opinion.

Reversed.

Brown, Chapman, Adams and Sebring, J. J. concur.
Buford, C. J., and Terrell, J. J. dissent.

DISSENTING OPINION.

Buford, C. J., dissenting:

I dissent because I think the sales contract which constituted a part of plea was free of discrimination and therefore the pleas were of no avail.

[R. 621-622.]

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A. D. 1945.

EN BANC.

BRUCE'S JUICES, INC., a Florida Corporation, *Appellant*,

vs.

AMERICAN CAN COMPANY, a New Jersey Corporation, *Appellee*.

An Appeal from the Circuit Court for Hillsborough County, L. L. Parks, Judge.

Cody Fowler and Shackleford, Farrior & Shannon, for Appellant.

John M. Allison, Harry B. Terrell and Whitaker, Whitaker & Terrell, for Appellee.

OPINION—Filed April 17, 1945.

PER CURIAM:

On rehearing granted after arguments and briefs submitted, we are of the opinion that the defense attempted to be interposed was not available under the facts submitted in evidence to the court below and, therefore, the judgment should be affirmed.

It is so ordered.

Terrell, Brown, Buford and Sebring, J. J. concur.

Chapman, C. J., Thomas and Adams, J. J. dissent.

CONCURRING OPINION.

SEBRING, J., concurring:

Upon consideration of the matter I have come to the conclusion that the subject matter of the pleas is not legally available as a defense in the state courts in a common law suit on the promissory notes involved. I therefore concur in the conclusion that the judgment of the Court below should be affirmed.

DISSENTING OPINION.

Upon rehearing granted we adhere to the original opinion. Chapman, C. J., Thomas and Adams, J. J. concur.

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## IN THE SUPREME COURT OF FLORIDA.

(Title omitted.)

ORDER DENYING PETITION FOR REHEARING—June 29, 1945.

Counsel for Appellant having filed in this cause Petition for Rehearing and having been duly considered, it is ordered by the Court that said Petition be and the same is hereby denied.

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## IN THE SUPREME COURT OF FLORIDA.

(Title omitted.)

ORDER STAYING MANDATE—June 30, 1945.

Upon consideration of the motion of counsel for Bruce's Juices, Inc., for an order staying the mandate herein, pending an application to the Supreme Court of the United States for a writ of certiorari, it is hereby

Ordered, that the mandate of this Court be, and the same hereby is, stayed pending appellant's petition in the Supreme Court of the United States for a writ of certiorari, provided said petition for certiorari is presented in said Supreme Court within the time required by law.

R. H. Chapman, Chief Justice of the Supreme Court of the State of Florida.

## APPENDIX B.

### The Statute Involved.

SECTION 13, TITLE 15, U. S. C. A.:

DISCRIMINATION IN PRICE, SERVICES, OR FACILITIES—PRICE; SELECTION OF CUSTOMERS.

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; *Provided,* That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall

prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

BURDEN OF REBUTTING PRIMA FACIE CASE OF DISCRIMINATION.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

PAYMENT OR ACCEPTANCE OF COMMISSION, BROKERAGE OR OTHER COMPENSATION.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or mer-

chandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

PAYMENT FOR SERVICES OR FACILITIES FOR PROCESSING OR SALE.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

FURNISHING SERVICES OR FACILITIES FOR PROCESSING, HANDLING, ETC.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

KNOWINGLY INDUCING OR RECEIVING DISCRIMINATORY PRICE.

(f) It shall be unlawful for any person engaged in commerce in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. Oct. 15, 1914, c. 323, § 2, 38 Stat. 730; June 19, 1936, c. 592, § 1, 49 Stat. 1526.

SECTION 13a, TITLE 15, U. S. C. A.:

DISCRIMINATION IN REBATES, DISCOUNTS, OR ADVERTISING, SERVICE CHARGES; UNDERSELLING IN PARTICULAR LOCALITIES; PENALTIES.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both. June 19, 1936, c. 592, § 3, 49 Stat. 1528.

## APPENDIX C.

### Illustrations of Failure to Produce Records or Permit Examination.

"Q. Will you produce from the records of your corporation—and this is the general office of the American Can Company—a list of the cans purchased by the various canning plants of the California Packing Company that purchased packers' cans in 1937, 1938, 1939, 1940, 1941 and 1942, and showing likewise from which plant or warehouse, referred to as distributing point, of the American Can Company these cans were delivered?

A. You are referring now only to those sizes that are competitive with the sizes purchased by Bruce's Juices?

Q. No, sir, I am referring to all cans referred to as packers' cans.

Mr. Allison: To the question or request as propounded the plaintiff objects for the reason that its scope goes beyond the present or possible future issues of this cause; it is to that extent immaterial and irrelevant.

Further, that the scope of the question seeks disclosure of confidential business matters between the plaintiff and (fol. 178) other customers which are not subject to disclosure without consent of such customers." (R. 134-135.)

"Q. Mr. Nugent, what was the amount of packers' cans purchased by the California Packing Corporation and delivered at that company's plant at Tampa, Florida, in year 1942?

Mr. Allison: To which question the plaintiff objects upon the ground that it seeks disclosure of confidential business relations with a customer other than the defendant and goes beyond the scope of this inquiry.

And the witness is instructed to refuse to answer the question, and the propriety of the question is certified to the Circuit Court for decision." (R. 138.)

"Q. Do you know how many customers, the total amount of the purchases of the customers who did not receive discounts?

A. It is in the records, but I do not know offhand.

Q. Will you produce that figure for us?

Mr. Callahan: That question is objected to as immaterial, incompetent and improper and not within the scope of this examination or the issues involved in this suit.

The witness is instructed not to answer the question, and the propriety of the question is certified to the Circuit Court for ruling." (R. 237.)

"Mr. Fowler: Gentlemen, I intend to ask this witness and likewise perhaps supplement the information which I seek to obtain from this witness by the evidence of Mr. George Madge, assistant comptroller of the American Can Company, now in this room, questions in substance as follows: to produce the invoices for the sale of cans to each of the corporations enumerated repeatedly in these proceedings for each year covered by this investigation, including the part of the year 1936; to produce the ledger sheets showing the amount of total charges made to each of these (fol. 321) customers for each separate year—and when I say each year hereafter it will be intended to mean from June 19, 1936, to the end of that year as being included in one of those years—which ledger sheet or other record shows the total charges for cans made against each of these corporations, the amount of cash payments and the amount of discounts and allowances and credits which make up the difference between the cash payments and the total amount of such charges; and if allowances and discounts and credits other than cash are disclosed, to investigate the details thereof.

Mr. Allison: It is further informally understood that should the foregoing questions be propounded to the named witnesses, or to any officers or employees of the plaintiff, called by defendant, the plaintiff would object to such questions, except as to the following corporations, to wit: Border Packing Corporation, Engelman Products Company and Taormino Corporation, for the reason that the same are immaterial and irrelevant to the issues and possible issues in this cause, that the same are beyond the scope of the order of court, and that the same constitutes a fishing expedition into the records of the plaintiff in support of its pleas, which effort goes beyond the purview of the statute sought to be invoked thereby, and seeks to make available to the defendant for his information and benefit confidential business relations with competitor customers of the plaintiff.

And the plaintiff announces that it would and will instruct any and all witnesses to decline to answer the foregoing questions as to the five corporations, other than the three

above named, and certifies the question to the Circuit Court for determination as to its propriety and admissibility." (R. 244-245.)

Mr. Callahan: In so far as an examination of Exhibits 10 to 14 is concerned the company will permit an examination of its records in so far as we are permitted to do so by customers of this corporation.

Mr. Fowler: Naturally that would be of no value to us. If it is so restricted we cannot obtain the information. In other words it is our contention that that proviso is equivalent to a declining to permit us to do so.

Mr. Callahan: In view of the position taken by counsel it is my judgment that the question be certified to the Circuit Court for determination as to its propriety, and the witness is instructed not to answer." (R. 239).

Examination of Allen Herbert Nugent, General Sales Manager for American Can Company:

Q. I will ask you if each of the following corporations did not also receive a discount under the contract for Sanitary cans purchased in the years 1936 through 1942 inclusive, the corporations in question being: Stokely Brothers & Company, Inc., Hawaiian Pineapple Company, Ltd., Libby, McNeill & Libby, Inc., Morgan Packing Company, and The Great Atlantic & Pacific Tea Company.

(fol. 266) A. You use the word "Sanitary," which I presume is the same as if you used the term "packers' cans." If that is correct then these companies did receive quantity discounts on their purchases in each of the years mentioned.

Q. Were those purchases arrived at by figuring the amount of Sanitary cans purchased as provided for in your contract?

A. Do you mean in our packers' cans contract?

Q. I mean in the form contract that was introduced in evidence after being produced by the attorney for the American Can Company, and in which contract I have not seen the words "packers' cans" used.

A. The purchases made by these companies under the packers' can contract were used in arriving at the amount of the discount, if any, to which each company was entitled.

Q. Now as a matter of fact you do not figure those discounts in your department, do you?

A. I do not.

Q. Therefore you have no personal knowledge as to how they are all figured, or what cans are included in those figures, do you?

A. Yes, I do. There is a statement attached to either the credit memorandum or the check as the case may be which we receive from the auditing department and which is forwarded to the customer through our department.

Mr. Fowler: I will call on you to produce those statements for the following corporations, and each of them, for the following years and each of them, to wit: California Packing Corporation, Stokely Brothers & Company, Inc., Hawaiian Pineapple Company, Ltd., Libby, McNeill & Libby, Inc., Morgan Packing Company, The Great Atlantic & (fol. 267) Pacific Tea Company, for the years 1936 through 1942 inclusive.

Mr. Allison: To which voice crying in the wilderness the plaintiff answers that it objects to the request for the reason that the information sought thereby is immaterial, irrelevant and improper to the issues formed and to be formed in this cause, or which may be formed in this cause.

Second, the information sought goes far beyond the scope of the issues herein.

Third, the information sought is that of a confidential nature between plaintiff and a customer other than the defendant, and can be solely for the information and immediate benefit of the defendant, without reference to the issues in this cause.

Fourth, the question is a continued reiteration of the same exploration heretofore conducted by the defendant herein and to which the plaintiff has consistently interposed these objections. The propriety of the request is certified to the Circuit Court for determination as to admissibility; and the plaintiff declines to furnish the information requested. (R. 201-203.)

Direct examination of William B. Ong, Auditor of the American Can Company:

Q. Turning to our Exhibit A, which is your first large sheet, am I right in concluding that this shows that in the months of April to November you had $16,000 of convention expenses?

A. $18,619.

Q. Now, who did you say decided that they would put those expenses in as an item here in this exhibit? Did you decide that?

A. No, the convention expense has always been distributed in our selling expense, as part of our selling expense.

Q. This exhibit also does not show how you divided these items of expense between the American Can Company and any of its subsidiaries, does it?

A. It is altogether in the statement.

Mr. Fowler: Gentlemen, I intend to ask this witness and likewise perhaps supplement the information which I seek to obtain from this witness by the evidence of Mr. George Madge, assistant comptroller of the American Can Company, now in this room [room], questions in substance as follows: to produce the invoices for the sale of cans to each of the corporations enumerated repeatedly in these proceedings for each year covered by this investigation, including the part of the year 1936; to produce the ledger sheets showing the amount of total charges made to each of these (fol. 321) customers for each separate year—and when I say each year hereafter it will be intended to mean from June 19, 1936, to the end of that year as being included in one of those years—which ledger sheet or other record shows the total charges for cans made against each of these corporations, the amount of cash payments and the amount of discounts and allowances and credits which make up the difference between the cash payments and the total amount of such charges; and if allowances and discounts and credits other than cash are disclosed, to investigate the details thereof.

Mr. Allison: It is further informally understood that should the foregoing questions be propounded to the named witnesses, or to any officers or employees of the plaintiff, called by defendant, the plaintiff would object to such questions, except as to the following corporations, to wit: Border Packing Corporation, Engel-

man Products Company and Taormino Corporation, for the reason that the same are immaterial and irrelevant to the issues and possible issues in this cause, that the same are beyond the scope of the order of court, and that the same consitutes a fishing expedition into the records of the plaintiff in support of its pleas, which effort goes beyond the purview of the statute sought to be invoked thereby, and seeks to make available to the defendant for his information and benefit confidential business relations with competitor customers of the plaintiff.

And the plaintiff announces that it would and will instruct any and all witnesses to decline to answer the foregoing questions as to the five corporations, other than the three above named, and certifies the question to the Circuit Court for determination as to its propriety and admissibility.

(fol. 322) Mr. Fowler: Inasmuch as it is the defendant's contention that the five corporations, whose records we will not under the instruction of counsel for the plaintiff be permitted to see, are the principal customers listed, and inasmuch as counsel does not feel it worth while to do a vain and useless thing, he will not interrogate further, and will join with counsel for the plaintiff in this one item [item], and that is certifying the question to the court, without precedent or prejudice (R. 243-245).

## APPENDIX D.

### Testimony of Leonard B. Smith.

MR. ALLISON:

Q. Please state your name?

A. Leonard B. Smith.

Q. Place and residence and occupation?

A. 911 Park Avenue, New York City. I am a lawyer and General Counsel for the American Can Co.

Q. You are a member of the Bar of the State of New York?

A. Yes, sir.

Q. How long have you been the General Counsel for The American Can Co.?

A. Ten years.

Q. Were you occupying that position at the time the Plaintiff's Exhibits Nos. 2 to 14, inclusive, were compiled?

A. Yes sir.

Q. Did you participate in the preparation of these schedules and these statistics?

(fol. 735) A. I participated in the preparation of this plan that was embodied in the book—Plaintiff's Exhibit 2 and also in the preparation of the Can Contracts containing Sales Discounts that have been introduced.

Q. Those are Plaintiff's Exhibits 2 to 28-A?

A. Yes, sir.

Q. Mr. Smith, will you please state in your own words the facts which entered into the preparation of those exhibits and the existing situation at the time they were prepared.

MR. FOWLER: To which we object, if the Court please, because it states reasons and motives, it calls for opinion testimony, and states why in his opinion certain things were done, when the only thing that has any bearing on this case is what was done, and the testimony would be improper, incompetent and irrelevant.

THE COURT: I will let him answer the question.

A. I can state what was done.

Q. That is what I have asked.

A. When the Robinson-Patman Law was passed it was apparent to the officials of The Company that all of the packers cans contracts with the Company would have to be cancelled. Those contracts contained certain unit discounts

and allowances to their customers that were permissible under the Clayton Act but could not be sustained under the requirements of the Robinson-Patman Law. And the Officials of the Company then set about to devise a system of quantity discounts that could be sustained by proof which would comply with the requirements of the Robinson-Patman Law.

Mr. Gordon Kellog, who is the Vice-President in charge of sales, made an estimation that, although there was no difference in the cost of manufacture of the cans, there was a (fol. 7,6) saving in the sales expense to the large customers which he estimated would run as high as 5 per cent. That was merely an estimate that he made from a knowledge of the business because previously no account of the sales expense of the Company had ever been kept, divided up among the different customers or classes of customers, but the sales expense was kept in a single amount for the entire Company.

In order to make any scale of quantity discount legal under the Robinson-Patman Law it was necessary that there should be proff that there was a saving in sales expense equal to the amount of the discount due only to quantities of purchases; and it was recognized that there might be differences in sales expense due to an infinity of different reasons, and they all had to be eliminated except the difference that was due to the difference in quantity alone; so that a comparison between the expense of selling to individual customers was of no value at all because there was no proof of how much of it was due to the difference in quantity; so then it was finally decided that if all of the packers can customers of the Company were divided into three classes consisting of the largest customers, the medium sized ones, and the smaller ones, that is, the division made solely on the basis of the annual volume of sales so that all kinds of customers, indiscriminately, good, bad and indifferent, were thrown into these three classes without any dividing line except solely the dividing line caused by the difference in volume of purchase, then, if it appeared that a detailed accounting of costs showed that there was a difference in sales expense between those three classes, and that this difference persisted month after month and year after year, then that difference must be due to the difference in quantity of purchases because there was no other differ- (fol. 737) ence between the classes: all the other

differences causing differences in sales costs would be washed out. It was considered that, in the number of packers cans purchasers which was fourteen or fifteen hundred, it was large enough to accomplish that washing out of all the differences of costs except differences that were caused by the difference in volume.

And I worked on this with the officials of the Company for several months and we got up this system of cost accounting, which is embodied in this little book "Packer's Cans Sales—Roadmen's Expense", in which there was no attempt to keep account of cost of sale to any individual customer, and all of the elements that went to make up the sales costs were segregated and kept account of in the manner shown in this book divided between the three classes of customers, the largest customer, the medium sized and the smaller.

That system of cost accounting was put in effect April 1, 1937. In the meantime, new contracts had been put out and signed with the customers containing the sale of quantity discounts which is in them now, based on the estimates that I have spoken of, that the officials had made without really any basis except their own knowledge of the business.

In order to induce customers to sign these new contracts there was made a flat reduction of eight per cent in the price of the sanitary cans, so as to induce the cancellation of all of the old contracts and the acceptance of the contracts containing the new scale of quantity discounts.

This cost accounting was kept month by month, and then at the end of each year when the annual volume of sales was known and the quantity discounts were calculated, then a statement was made up to see whether the saving approved in the cost expenses was equal to the amount of the discounts (fol. 738) that were paid, and it proved that the saving was equal and a little bit more.

The result of this cost accounting showed two things?

1. It showed that the saving in the selling expense to the customers in the very highest bracket, what they call Class "A", I think, was a little more than 5 per cent discount which they received. It varied slightly but I think it was always between five and six per cent.

2. It showed that the total aggregate saving of sale expense to all of the customers who received discounts was greater than the total aggregate of all of the discounts paid.

That system was continued for, I think, four years and nine months. It involved a very laborious burden on the sales force and the accounting force, and took up a great deal of the salesmen's time and a great deal of accounting work, but the result of it as shown in these statements are offered in evidence, and while these percentages varied slightly up and down from time to time; they remained to all intents and purposes substantially permanent and we considered that they proved beyond the possibility of dispute that the saving of sales expense which they showed was due to the difference in the quantity of purchases because there was no other difference between these three classes of customers.

Cross-examination.

Mr. Fowler:

Q. Mr. Smith, I believe you stated that the American Can Co. recognized that it could not give any discounts that it could not justify in savings. Is that correct?

A. Not only that, I said it could not give any discounts that it could not justify under the Robinson-Patman Law. It was not every kind of a saving that would justify a dif- (fol. 739) ference in price or discount under the Robinson-Patman Law. There were only two kinds. The Robinson-Patman law specified difference in methods, and there might be an infinity of other reasons difference of cost but the only thing that would justify a difference in price under the Robinson-Patman Law would be a difference in the method and in the quantity in which the goods were sold and delivered.

Q. In other words these discounts here in your Contract are *prima facie* illegal unless, as a matter of fact, you can justify those discounts in costs either from the manufacturers sale or delivery resulting from the different method or quantities in which such commodities are to such purchases sold and delivered?

A. Yes, sir.

Q. And each time that is attempted the burden is on you to justify those discounts, is it not?

A. Yes sir, I think so.

Q. You refer to small customers as the "C" group, and the way you classified them, they were all customers who buy less than $500,000.00 of cans a year?

A. Yes, sir.

Q. The way you classified them?

A. Yes, sir.

Q. Under your plan, take for example the California Packing Corporation, with a factory at Tampa, another one in Utah, two or three in California, and one in Ohio, it is your contention that you can add all those purchasers together in order to get the total of purchases to place them in one of these brackets placed in your contract.

A. That is proved by the way we kept the accounts.

Q. That is the way you did it?

A. Yes, sir.

Q. When these costs come in who allocates them on types that are between "A", "B" and "C" accounts?

A. That is all done in this book Plaintiff's Exhibit 2. It shows the way in which the road men have to keep account of their time so that their time can be divided up to (fol. 740) make the different classes and the book describes how it is allocated between the different classes, and that is all done then in the Auditor's Department, I mean the work of writing the books.

Q. Who says whether a special item of expense that comes in that there may be some doubt about goes into which one of these accounts, who passes on that?

A. The Salesmen *have* to keep a daily record of the time that he has spent and no one questions that. He has to write down every day how much time he spent on customers in each of these three brackets.

Q. And he is the one that allocates between the different customers?

A. He allocates his own time, yes sir.

Q. Could a man selling asparagus in California, buying cans from you, get together with a canner of citrus in Florida and purchase together to get in one of these classes?

A. No sir, we do not permit any co-operative buying associations that do not operate canneries, we do not allow them any quantity discount.

Q. Could you tell me why, in this little booklet—"Plain*rigg*'s Exhibit No. 2, you charged commission to all those in Class "C" when most of them, for example those in Florida do not have any commission charged against their purchases?

A. Well, it was a sales expense.

Q. In other words, if the commission is charged against the "C" customer in Ohio, it is put in the general pot and charged against all the customers including those in Florida?

A. We are not allowed to make any difference in price. We have to charge all the same whether they were brokers or not, under the Robinson-Patman Law.

Q. You are allowed to make allowances for actual savings? (fol. 741)

A. Only for savings due to the two causes that I mentioned or the different methods or the quantities.

Q. Then if you paid commissions to the small canners elsewhere, it is charged against all small canners including those in Florida where there is no commission paid?

A. It is charged against that Class, not against any individual canner at all, against the Class as an expense of doing business with the customers in the small class. All of the sales expense has to be put into this account and it is sometimes necessary to do business with small canners by means of brokers but I do not think it ever is necessary to do so with large customers. That is sales expense and it has to be put in the class of customers in which it is incurred.

Q. In other words irrespective of how many or how few times your salesmen have to call on an individual customer or how few or how often your mechanics or whatever you call them, call on your customers to work on his closing equipment or machinery, he is put in the same class irrespective to what his personal costs to you or your Company are.

A. Those are differences of expense for which the Law does not allow difference in price, but the only difference in cost for which any difference in price is justified, is a difference in expense that is due to method or to quantities and we were keeping account of the difference that was due to the different quantities, and that is all. And, as I have explained, the only way that we knew of, and the only way that I know of or ever heard of to keep account of a difference in cost due only to quantities or sales is to classify the customers according to the quantity and see what is the difference between those different classes because then all other causes of difference in expense are indiscriminately (fol. 742) thrown in together and they wash each other out.

Q. In doing that you classified the little customers, including Alaska, Hawaii and all other States where you do business?

A. All of the customers that come within the quantity classification. I do not think that applied to customers outside of the United States. I do not recall about that.

Q. You would not say that is not true?

A. I do not recall that. This is six or seven years ago, but I remember very well in a general way when it was done, but I do not recall whether it included any customers outside of the United States.

Q. But there are parts of the United States where there are a large number of small canners, are there not?

A. Yes, sir.

Q. What was the total sales cost in relation to the total sales; that is the percentage of the total sales costs in connection with the total sales of the American Can Co.?

A. That is shown in the exhibit. It varied from time to time. I don't know just what it was.

Q. I will ask you if it was not approximately 2 per cent?

A. I could not say that. I do not remember the figures.

Q. Would you say that is not correct: look at your exhibits there: could you tell us that?

A. These Exhibits 5 to 9 show the total sales expense *expense* each year but I don't know what the total sales were for those years.

Q. You divide five, I think, into the nineteen million and arrive at 1 per cent: in other words I think we contend that they are actually 2 per cent although they allow as much as 5 per cent (fol. 743) to a large number of their customers?

A. I do not know. I think that the total sales expense was more than two per cent but of course there might be a saving in the higher brackets more than the average of the sales expense for the entire business, because most of that expense might have been in the lower brackets so that a saving in the higher brackets might have been more than the average of the entire sum. (R. 571-578)